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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-752

VICTOR DeCOSTA,

Petitioner,

v.

COLUMBIA BROADCASTING SYSTEM, INC., CAPITAL CITIES BROADCASTING CORPORATION and CBS FILMS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

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January 9, 1976

ABE DUPLICATORS, INC.—1732 Eye Street, N.W.—Washington, D.C.—298-8637

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Several comments are in order in response to the respondents' Brief in Opposition to the Petition.

I

The respondents' effort (Opp. Br. 9-12) to read "intrinsic logical rigor" into the First Circuit's ruling as to the reviewability of a Magistrate's report succeeds only in underscoring the "intrinsic illogic" of that ruling, and hence the need for this Court's review of the matter.

Respondents' version of the ruling below appears to be as follows:

(1) Rule 53(e)(4) should have controlled the District Court's review of the Magistrate's report, so that his findings of fact would be considered "final" and his legal conclusions fully reviewable. Hence the "logical rigor" of this notion would be that the Magistrate's findings of fact as to the "likelihood of confusion" between identical competing service marks, findings which respondents assert are factual in nature (Opp. Br. 18), are final and binding on the District Court.

(2) But somewhere between the District Court and the Court of Appeals, the Magistrate's findings of fact lose their "finality". Rule 52(a) suddenly appears so as to compel the Court of Appeals – not the District Court – to "treat the factual findings of the Magistrate adopted by the District Court as subject to the clearly erroneous standard." Opp. Br. 12. The "logical rigor" of this position is that, in a consensual reference situation that (as here) is likened to a Rule 53(e)(4) reference to a master, the Magistrate's findings of fact are totally unreviewable by the District Court, thus forcing the protesting party to add to the appellate workload in order to secure a *de novo* Rule 52(a) review of the Magistrate's fact findings. The District Court is thus given no function other than to place its automatic imprimatur on the Magistrate's fact findings, which imprimatur is the technical basis for invoking the Rule 52(a) *de novo* appellate review of the Magistrate's fact findings.

Thus to denigrate the role of the District Court with respect to the Magistrate's fact findings and to impose

additional and unnecessary review burdens on the Court of Appeals seems incompatible with sound judicial administration of the Federal Magistrates Act. The confusion instilled into that Act by the decision below certainly deserves attention and correction by this Court.

II

The respondents' effort to confirm the "rectitude" of the First Circuit's ruling by reference to pending amendments to the Federal Magistrates Act (Opp. Br. 12-15) is belied by the history and the language of those amendments, as set forth in the Appendix to the Brief in Opposition.

At the outset, it must be emphasized that the instant reference of cross motions for summary judgment is not the kind of reference of a "pretrial matter" to which §(b)(1)(A) of S. 1283 applies, including its "clearly erroneous" standard of review by the District Court. See Opp. Br. App. 61. Rather this reference falls within the scope of the proposed §(b)(3), which permits a Magistrate to be "assigned such additional duties as are not inconsistent with the Constitution and laws of the United States" — a provision repeated from the present statute and which was found by both courts below to underlie and justify the instant reference.

The Report of the Judicial Conference (Opp. Br. App. 40) states that this proposed §(b)(3) is already "contained in the existing legislation" and "enables the district courts to continue innovative experimentations in the use of this relatively new judicial officer . . . [and] is not restricted in any way by any other specific grant of authority to magistrates."

But the proposed amendments say nothing whatever about the standard of review of magistrates' reports, consensual or otherwise, that are made under this innovative "additional duties" provision. True, proposed §(b)(1)(C) says that the District Court, upon receiving objections from a party, "shall accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." But that subsection provision seems applicable only to the reference of certain pretrial matters specified in §(b)(1)(A), and not to an "additional duties" reference under §(b)(3).[1] And in any event, §(b)(1)(C) provides no ascertainable standard for reviewing a magistrate's report, whatever kind of reference that subsection encompasses.

And so we are left, with or without the adoption of the proposed amendments, with the critical questions posed by the decision below. Are the magistrate's findings of fact reviewable by the District Court only for "manifest error" or are they reviewable under the "clearly erroneous" doctrine of Rule 52(a)? Are such findings of fact to be considered "final" and unreviewable by the District Court where, as here, the consensual reference is likened to a reference to a special master under Rule 53(e)(4)? Is the Court of Appeals then authorized or compelled to review the magistrate's findings of fact, as automatically accepted by the District Court, under the Rule 52(a) standard?

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[1] As stated by the spokesman for the National Council of United States Magistrates (Opp. Br. App. 22), "The clearly erroneous test of Rule 52a [specified in proposed §(b)(1)(A)] . . . is adopted for non-dispositive motions."

Indeed, the most ardent proponents of the suggested amendments, such as the National Council of United States Magistrates, are uncertain as to the standard of review applicable to references of the instant type, especially as enunciated by the First Circuit. Mr. Morris L. Sear, the chairman of that Council's legislative committee, cited the *DeCosta* opinion below as an indication of the need for "legislative direction and uniformity of the scope of review references to magistrates."[2] See Opp. Br. App. 22. And Mr. Sear again cited this *DeCosta* case as a prelude to his testimony "that many courts have been reluctant to approve references to magistrates because of the absence of some legislative direction and some uniformity." Opp. Br. App. 30. Unfortunately, no such legislative direction seems forthcoming.

Thus, neither the proposed amendments nor their proponents profess to answer the review problems posed by the First Circuit's opinion in this case. The need for this Court's review is thereby substantially augmented.

III

The other arguments in the Brief in Opposition warrant no extended reply. For the most part, they are either answered by the opinion below or are irrelevant and unresponsive to the arguments in the Petition. Respondents'

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[2] Specifically cited was the statement in the First Circuit's opinion in this case (see Pet. App. A.13), that "What does not appear at all clear to us is whether the decision . . . once rendered is by statute subject to very limited review or to review for any prejudicial error as required by F.R. Civ. Pr. 53(e)(4)." Opp. Br. App. 22.

argument (Opp. Br. 16) that the court below held that an individual's avocational use of a slogan or costume falls outside the common law of service marks is contradicted by the First Circuit's express refusal (Pet. App. A.23) to "rely on a holding that the absence of a profit-oriented enterprise disqualifies plaintiff from protection." And not one of the direct conflicts between Circuits, as demonstrated at pages 26-29 of the Petition, is even acknowledged or denied by the Brief in Opposition.

But strangest of all is the phantom argument in the Brief in Opposition (pp. 20-22) that "review is not warranted to consider petitioner's suggestion that the Court should apply the decisions in *Goldstein* and *Kewanee* to the Court of Appeals' 1967 decision." Petitioner has made no such suggestion and has not presented the retroactive effect of those decisions as one of the Questions Presented (see pp. 2-3 of Petition).

Petitioner made reference in the Petition (p. 10) to the fact that *Goldstein* and *Kewanee* have undermined the First Circuit's 1967 decision in this case, as the First Circuit itself has acknowledged. But that reference appears in the Statement of the Case as part of the background of the present ruling. No retroactivity issue is thereby raised.

CONCLUSION

The Brief in Opposition inadvertently serves to emphasize the appropriateness of granting review of the First Circuit's decision, precisely for the reasons expressed in the Petition.

Respectfully submitted,

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